WP(C) 5722/2006
BEFORE
THE HON'BLE MR JUSTICE RANJAN GOGOI
IN THE GAUHATI HIGH COURT
(THE HIGH COURT OF
ASSAM, NAGALAND, MEGHALAYA, MANIPUR, TRIPURA MIZORAM AND ARUNACHAL PRADESH)

Writ Petition (Civil) No.5722 of 2006

Petitioner :
Shri Sheo Balak Singh,
Superintending Engineer (Civil),
Commander, 42 BRTF (GREF),
C/O 99 APO.

By Advocates :
Mr. D. K. Misra, Sr. Advocate.
Mr. K. Goswami,
Ms. P. Khirney, Advocates.

-versus-

Respondents:

1. The Union of India,
Represented by the Secretary,
Border Roads Development Board,
Ministry of Surface Transport,
New Delhi.

2. The Director General,
Border Roads, New Delhi.

3. The Joint Director (Personnel Branch),
Border Roads, New Delhi.

By Advocate:
Mrs. R. Bora, Central Govt. Counsel.

B E F O R E

THE HON'BLE MR. JUSTICE RANJAN GOGOI.

Date of hearing : 04.01.2007.

Date of delivery of Judgment : 08.01.2007.

JUDGMENT & ORDER

1. An order of transfer dated 26.10.2006 has been assailed in the present writ application. By the aforesaid order the petitioner has been transferred from Headquarters HQ 42, BRTF/SETUK to Headquarters CE(P) SAMPARK. The petitioner is a Superintending Engineer in the General Reserve Engineering Force (GREF) under the Border Roads Development Board (BRDB). It may also be noticed, at this stage, that by the impugned transfer the petitioner is required to move from his present posting in Tripura to the State of Jammu & Kashmir.

2. According to the petitioner, he had earlier instituted a writ proceeding before this Court registered and numbered as W.P.(C) No.4989 of 2006 wherein he had assailed an order dated 12.5.2006 of the Director General, Border Roads, declaring status-ante with regard to the equivalence of the post of Superintending Engineer with that of regular Colonel of the GREF. According to the petitioner, the respondents not being happy with the challenge made by the petitioner has transferred him to the State of Jammu & Kashmir by the impugned order dated 26.10.2006 only with a view to preventing the petitioner from pursuing his earlier writ petition filed before this Court. Additionally, according to the petitioner, under the transfer policy in force the petitioner being in a command post in the 42 BRTF is entitled to have a tenure of 2-3 years and the impugned transfer, before completion of the laid down tenure, is premature and contrary to the norms in force. It is on the aforesaid two broad grounds that the challenge projected in the writ petition has been sought to be built up.

3. The respondents have filed an affidavit contesting the claims made in the writ petition. According to the respondents, there are 13 command posts in the GREF which can be manned by Superintending Engineers. Under the promotion policy, in force, a Superintending Engineer to be eligible for promotion to the next higher rank of Chief Engineer must have at least two years of experience in a command post. In the affidavit filed, the respondents have further stated that as the normal tenure of a command/ executive post is two years which is extendable to three years attempts are made to ensure that an incumbent remains in a command post for at least two years so as to make him eligible for further promotion. Shifting of an Officer before completion of two years tenure in a command post as well as his retention beyond two years would depend on the organizational needs. According to the respondents, the petitioner is due to complete a tenure of two years in the command post in 42 BRTF on 20th December 2006 and therefore to make room for other deserving Superintending Engineers who have not yet held a command post the impugned transfer has been made. In the affidavit filed the respondents have also categorically denied that the institution of the writ proceeding registered and numbered as W.P.(C) No.4989/2006 has any reasonable connection with the transfer of the petitioner. In this regard it has been pointed out, in the affidavit filed, that the posting proposal of as many as 17 officers including the petitioner, upto December 2006 was prepared by the Joint Director (Personnel) on 28.6.2006. Thereafter, it was approved on 26.10.2006 whereafter the impugned order of transfer has been passed. In the affidavit filed, the respondents have also stated that out of the total 23 years of service rendered by the petitioner he has served for more than 16 years in the North Eastern Sector and therefore to maintain a balanced Sector-profile in the case of the petitioner and in accordance with the transfer policy in force the impugned order had to be passed.

4. The petitioner, on receipt of the counter-affidavit of the respondents, has filed an elaborate rejoinder affidavit as well as an additional affidavit wherein the stand taken by the respondents has been vehemently disputed. In the aforesaid two affidavits, the petitioner has reiterated that under the transfer policy in force the normal tenure of an executive posting is up to three years which tenure has been sought to be curtailed in the case of the petitioner for extraneous reasons. The petitioner has also disputed the stand taken by the respondents that the practice in vogue is to transfer an incumbent holding a command pos

t on completion of two years as the number of command posts available are limited. In this regard, in paragraph 7 of the rejoinder affidavit, the petitioner has given details of as many as 7 incumbents holding command posts who have been allowed to serve for periods exceeding two years.

In the rejoinder affidavit filed the petitioner has also stated that one Sri V. K. Prasad, Superintending Engineer, was posted in Project Sampark by an order dated 13.9.2006, yet, on 26.10.2006 the petitioner was transferred to the same project. Though the posting of the aforesaid incumbent i.e. Sri V. K. Prasad, was altered subsequently, the said alteration took place on 30.10.2006 i.e. after the petitioner was posted in Project Sampark. The above facts, according to the petitioner, would be sufficient for this Court to understand that the transfer of the petitioner has been made for extraneous and mala fide reasons and not on account of the pressing organizational needs as has been contended in the counter affidavit of the respondents. With regard to the necessity to maintain a balanced Sector profile of the petitioner, as projected by the respondents in the counter-affidavit, the petitioner has stated that out of the total 23 years of service rendered by him he has served about 13 years in the North East, six years in the Western Sector and three years on foreign posting i.e. Bhutan. According to the petitioner, the proportion of service in the Eastern and Western Sector i.e. 55 : 45 is sufficiently maintained and the petitioner has another 10 years of service for the authorities to maintain the proper ratio/proportion as prescribed by the transfer policy in force.

It is on these facts that the Court is required to decide on the legality and validity of the impugned transfer order dated 26.10.2006 keeping in mind the correct principles of law within which the Writ Court is required to exercise its power while determining a challenge of the kind that confronts the Court in the present case.

5. While it is correct that the contours of the power of the Court to interfere with a transfer order is no longer res integra yet the application of the ’settled’ principles of law is not without difficulties. Facts and circumstances disclosing an apparent mala fide i.e. mala fide in fact would rarely manifest itself before a Court. The lesser degree of mala fide which would still warrant judicial interference i.e. malice in law, is the yardstick that has to be normally adopted. Determination of the presence of any malice in law in a transfer order would require the Court to examine as to whether the transfer is contrary to either the statutory or professed norms as may be in force. The two tests i.e. whether a transfer has been made mala fide or is contrary to the norms in force, in most cases, will go hand in hand and, therefore, require the Court to correlate one with the other. It must be emphasized at this stage that in exercising its powers while examining the validity of a transfer order the Court must be extremely cautious to ensure that it does not trench upon the powers of the executive which must be acknowledged to be pre-dominant. After all, it is for the administrator and not for the Court to determine where a particular Officer should be posted. Courts neither possess the expertise that would be required for such determination nor the Court can be expected to be well versed with the multifarious considerations that are required to go into the decision making process in this regard. It is because of these facts that the Courts have carved out for themselves a very limited jurisdiction which has to be primarily exercised to prevent arbitrariness and misuse of power by the administrator.

6. Having made an attempt to understand the correct legal position the Court now must apply the ’settled’ principles to the facts of the present case.

The petitioner asserts that it is on account of the fact that he had earlier instituted a writ proceeding before this Court i.e. W.P.(c) No.4989 of 2006, the respondents have transferred him to Jammu & Kashmir in order to ensure that the petitioner cannot effectively pursue the aforesaid case filed by him. A bare reading of the transfer order dated 26.10.2006 would go to show that the petitioner has been replaced by one Sri S. K. Tripathi who is to take over from the petitioner on 20th of December 2006. The petitioner is required to move to his n

ew place of posting only when the reliever reports. This would go to show that t he transfer order though dated 26th October 2006 is to become effective only on 20th December 2006. The petitioner was due to complete his two years of tenure i n a command post, which is an essential condition of his eligibility for promoti on to the higher post, on 20th of December 2006. The respondents, in the affidav it filed, have stated that in the Border Roads Organisation every endeavour is m ade to allow an incumbent to complete two years of service in a command post and unless there are compelling reasons he is not moved out earlier. Surely, if the respondents have been actuated by mala fide intentions they would not have made the transfer order of the petitioner effective only on completion of two years of service in the command post held by the petitioner. That apart, the original records placed before the Court, though not in the form of note-sheets but in th e form of a compilation of the posting proposals, makes it abundantly clear that in cases of some of the Officers included in the said posting proposal, approva l of the proposal of transfer have been granted on different dates in the months of August as well as September 2006. The said fact adds credibility to the stan d taken by the respondents that the transfer proposal of the petitioner which is included in the posting proposal, as placed before the Court, was actually form ulated in the month of June 2006 i.e. much before W.P.(C) No.4989 of 2006 was in stituted by the petitioner.

7. The petitioner contends that he has been 'prematurely' transferred befor e completion of his tenure of three years and that there are several instances o f incumbents holding command/executive posts in the Border Roads Organisation wh o have been allowed to continue beyond two years. Strictly speaking, the concept of any 'tenure' of a civil servant in any particular location is a misnomer. Th ere is no vested right in any civil servant to be posted in any particular locat ion for any fixed duration of time. The concept of 'tenure' has to be understood in the context of a minimum period of service in a particular station from the standpoint of the necessity of avoiding frequent and uncertain shiftings of an i ncumbent from one place to another which is not conducive to a healthy system of administration. However, any 'tenure' has to give way to the needs of the organ ization. The transfer policy in the present case contemplates a executive/comman d tenure of '2 or 3 years'. The very language used would mean that such a tenure should be for a minimum of two years and a maximum of three years subject to th e organizational needs. On the date when the transfer of the petitioner was to t ake effect i.e. 20.12.2006, he was to have completed two years in a command post . That other officers holding a command post have been allowed to continue beyon d two years will not make the petitioner's transfer on completion of two years t o be mala fide or contrary to the laid down policy. Surely, the Court will not r equire the transfer of any incumbent to be preceded by an exercise to find out w ho amongst the officers of the equivalent rank has had the longest tenure and to first transfer out such a person before transferring an officer with a shorter tenure. Such a requirement cannot be understood to be the need of a fair adminis tration. Exigencies of the administrative process may require retention or conti nuation of an incumbent with a longer length of service and transfer of an incum bent with a shorter tenure of service. All would depend on the needs of the admi nistration which need should be left to be assessed by the administrator and not by the Court.

8. The petitioner also asserts that the transfer order dated 26.10.2006 was made at a time when Sri V. K. Prasad was already posted in Project Sampark by o rder dated 13.9.2006 and that the said order of posting of Sri V. K. Prasad was cancelled on 30.10.2006. As the said cancellation is subsequent to the transfer of the petitioner made by order dated 26.10.2006, according to the petitioner, t he same was made only to create room for the petitioner. The documents reflectin g the posting proposal of Sri V. K. Prasad, as placed before the Court, disclose s that the transfer of the said person to Project Sampark was cancelled on 27.10 .2006 after discussions with the Director General, Border Roads, and further tha t he was posted at Project Sampark as an additional Officer. If the said posting

of the concerned incumbent i.e. Sri V. K. Prasad in Project Sampark was as an additional Officer, the Court will understand that there was room for the petitioner to be posted in the same project. In any case, the posting of Sri Prasad as an additional Officer in Project Sampark was subsequently cancelled after discussions with the Director General. The said fact, in the absence of any other facts, by itself, cannot lead to the conclusion that the cancellation was made only to enable the respondents to post the petitioner in Project Sampark.

9. For all the aforesaid reasons, the court is of the view that the present is not a fit case for exercise of this Court’s power under Article 226 of the Constitution to interfere with the impugned transfer of the petitioner made by order dated 26.10.2006. The writ petition, therefore, has to fail. It is accordingly dismissed, however, without any cost. Interim order passed earlier in the case is vacated.

JUDGE

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